

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1273 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES
5. Whether it is to be circulated to the Civil Judge? : NO

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OIL & NATURAL GAS COMMISSION

Versus

D C SHUKLA

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Appearance:

MR RAJNI H MEHTA for Petitioners

MR IS SUPEHIA for Respondent No. 1

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CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 15/10/1999

ORAL JUDGEMENT

Learned Advocate Mr. R.H.Mehta is appearing for the petitioner, ONGC. Learned advocate Mr. I.S.Supehia is appearing for the respondent workman. The respondent workman has raised industrial dispute being Reference (ITC) No. 37 of 1987 before the Industrial Tribunal Ahmedabad, Ahmedabad. The exact terms of the reference are as under :

"Whether the management of ONGC is justified in terminating the services of Shri D.C.Shukla, Jr. Technician (Elect), Mehsana, w.e.f. 9.3.84 ? If not, what relief Shri Shukla is entitled to?"

Before the industrial tribunal ("the tribunal " for short), the union has filed the statement of claim vide Exh. 7 and the written statement was filed by the petitioner - Oil and Natural Gas Commission ("the Commission" for short) vide Exh. 9. The workman was examined as witness before the Tribunal on 12.1.1988 at Exh. 27 and, thereafter, three witnesses were examined by the petitioner Commission before the Tribunal namely Shri Balakrisna Nair (11.3.88 Exh.23), Shri Jayantibhai Melabhai Vasava (11.4.88 Exh.41) and Shri Jayantibhai Mafabhai Parmar (26.4.88 Exh. 46). It was the case of the workman before the tribunal that he had joined the the Commission on 7th March, 1969 as As contingent worker and he was appointed as Assistant Technician (elect) in a regular scale on 10.12.1970 and, thereafter, the workman was promoted as Jr. Technician (Elect.). Before the labour court, it was the case of the workman that he was sick, he had an attack of Pulmonary Koch and Hepatitis and that he was, therefore, not in a position to attend the duties after 10.12.1983 and that he had sent leave application form under certificate of posting on 12.1.1984 and again on 9.4.84 giving reasons for not reporting for duties. However, to his surprise, he received an office order intimating him that he is deemed to have resigned from service with effect from 8.3.84. Said order was challenged by the workman on the ground that it amounts to retrenchment in violation of section 25F of the Industrial Disputes Act, 1947 ("the ID Act" for short). He challenged the said order also on the ground that such powers to terminate the services of ground that the exercise of powers to terminate the services of Regulation 14(5) of the ONGC Leave Regulation is arbitrary and contrary to the principles of natural justice. However, he was told that his name was deleted from the muster roll and, therefore, nothing could be done on being represented by the respondent workman.

It was the case of the Commission before the Tribunal that the workman had remained absent without permission and, therefore, the action has been taken against him as per ONGC Leave Regulation No. 14 (5). It has also been contended, inter alia, that a show cause notice had been issued to him before passing the final order and that the workman concerned had failed to give

any reply. Ultimately, the Commission has pleaded before the tribunal that the action is legal and valid and, therefore, the demand should be rejected.

Relevant Regulation 14 is quoted in the impugned award at page 3 which reads as under :

14. Extra ordinary leave :

- (1) Extraordinary leave shall be admissible to an employee in special circumstances when:-
  - (a) no other kind of leave is admissible under these regulations; or
  - (b) other kind of leave being admissible, the employee applies in writing for the grant of extraordinary leave.
- (2) The period of extraordinary leave granted on any one occasion shall not exceed three months except under the following circumstances, namely:
  - (a) If such leave is availed of on medical grounds duly supported by Medical certificate, the maximum period admissible shall be six months;

Provided that in case where such leave is required for undergoing treatment for any of the following diseases, the limit shall be 18 months:-

- (i) Pulmonary tuberculosis and the application for leave is supported with a certificate from a Specialist in Tuberculosis;
- (ii) Tuberculosis of any other part of the body and the application is supported with a certificate from a Specialist in Tuberculosis or a civil surgeon; or
- (iii) Leprosy in a recognized leprosy institution or by a Civil Surgeon or a Specialist in a Leprosy Hospital recognized by the Commission and the application for leave is supported with a certificate from the concerned Medical Officer:

Provided further that leave upto 18 months

may be sanctioned under the first proviso only if the employee has put in one year service in the Commission on the date of proceeding on such leave or on the date of expiry of the leave otherwise due and admissible under these regulations.

- (b) In case such leave is required for prosecuting studies, certified to be in the interest of the Commission, the maximum period admissible shall be 24 months;

Provided that this clause shall apply only to an employee who completes not less than three years continuous service on the date of expiry of the leave of the kind due and admissible under these regulations (including extraordinary leave, if any, taken under this sub regulation):

Provided further that:-

- (i) Every employee who is granted such leave shall execute a bond in the form at Annexure I appended to these regulations:

- (ii) If such employee resigns or otherwise quit the service of his own according at any time within a period of three years from the date of expiry of extraordinary leave, he shall be required to pay to the Commission, the following amount for failure to discharge the obligations, namely:

- (a) Officers in the scale of Rs.700-1250 and above Rs.5000/-
- (b) Officers in the scale of pay of Rs.325-800 and above but not falling under item (a) - Rs.3000/-.
- (c) Others Rs. 2,000/-.

- (3) The competent authority may, at its discretion, convert a period of absence from duty without leave into extraordinary leave.

- (4) No leave salary shall be admissible during the period of extraordinary leave.

- (5) Where an employee fails to resume duty on the

expiry of the period of extraordinary leave if the leave granted to him is the maximum that can be granted under this regulation or where an employee who is granted a lesser amount of extraordinary leave than the maximum admissible for any period which, together with extraordinary leave so granted exceeds the limit upto which he could have been granted leave under this regulation, he shall be deemed to have resigned his appointment and shall accordingly cease to be in the employment of the Commission, unless the Commission may determine otherwise, in view of the exceptional circumstances of the case."

After quoting the said regulation NO. 14(5) as aforesaid, the labour court observed that the said Regulation shall operate only when an employee fails to resume duties after the expiry of the period of extraordinary leave granted to him if it is the maximum that can be granted under the regulation or in a case where the employee is granted lesser amount of extraordinary leave than the maximum admissible but he remains absent for more than the total maximum period of extraordinary leave admissible or less than the maximum as the case may be, must be specifically granted to him in the first instance. IN the case of the workman herein, no such extraordinary leave has been granted by the Commission. It was also observed by the tribunal that in fact, the workman herein had not applied for such extraordinary leave. After considering regulation 14(5), the labour court has come to the conclusion that such contention which has been raised by the Commission is an after thought contention and that no specific averment is made in the written statement and that there is no evidence to show that the Commission had passed any order regarding the workman herein as per regulation No. 14(5) the tribunal had rejected the said contention.

After appreciating the evidence on record, the tribunal has believed that the workman had made applications for leave on 12.1.84 and 9.4.84 and that the Commission had not replied those two applications but had removed him from service by order dated 7.5.84.

Thereafter, the labour court appreciated the aspect of show cause notice. It was contended by the workman that the commission has not issued any show cause notice before removing him from service which was denied by the commission by contending that a notice to show cause was issued to the workman, receipt whereof was

denied by the workman. In respect of this contention, the tribunal has observed that the commission has not produced any evidence to show that the said memo of notice to show cause has actually been served on the workman. The tribunal has ultimately concluded that the workman has not received the memorandum. The tribunal has also come to the conclusion that from the evidence on record, it is clear that the workman has not received the memorandum dated 17.4.84. The tribunal observed that the complete reading of the memorandum would show that it cannot be treated as a show cause notice in its true sense. The workman has never been asked to submit any explanation and the notice is issued after completion of 128 days and the Commission has informed the workman that his name will be struck off on completion of 90 days of unauthorized absence. Thus, the tribunal observed that the memorandum is given to him much later than the completion of ninety days and that no explanation has been called for from him. In the circumstances, the tribunal concluded that the memorandum cannot be construed as a proper show cause notice.

The tribunal has also considered that the authority who has signed the impugned order of termination was not the appointing authority and, therefore, was not competent to pass the said order and that the power to terminate the service has not been delegated to the administrative officer and, therefore, the order of termination is illegal. The tribunal also considered another aspect that the termination order passed by the petitioner Commission is in violation of the principles of natural justice because the impugned order of termination speaks of unauthorized absence without permission on the part of the respondent workman which is, undoubtedly, a misconduct. On that sole basis, the workman has been removed from service without giving proper opportunity of showing cause in gross violation of the principles of natural justice. The tribunal has also observed that the petitioner commission has not taken care and has not bothered to prove the misconduct of unauthorized absence before the tribunal. The tribunal, has considered the decision of the apex court in case of Binny and CO. Ltd. versus workmen, reported in 1973 Lab. IC 1119, as also the decision of the Delhi High Court in case of Hamdard Dawakhana (Wokf) Delhi versus DD Gupta and others reported in 1985 Lab IC 326, cited by the petitioner Corporation. Thereafter, the tribunal has observed that the action has been taken by the Commission under Regulation 14 (5) of the ONGC Leave Regulations is not sustainable and that the legal fiction of resignation from service has not come into play and the regulation

14(5) is not applicable. The order of termination has not been signed by the proper authority and that the Commission has not considered the leave applications submitted by the workman. As regards the contention of the Commission that the leave applications were not received by it, the tribunal observed in paragraph 13 of the award that there is sufficient evidence to show that the leave applications were sent by the workman and that the workman has been punished for an alleged act of misconduct, but no opportunity has been afforded to the workman for defence and no misconduct has been proved and that the workman was able to produce evidence to show that he was sick for quite some time and that the workman had made several representations to the ONGC after the issue of the impugned order but of no avail and ultimately, it was held by the tribunal that the action of the ONGC in terminating the services of the workman is neither legal nor justified. The tribunal, therefore, allowed the reference by holding that the action of the ONGC in terminating the services of the respondent workman is neither legal nor justified and ordered reinstatement of the respondent workman with full backwages and other consequential benefits as if the workman has never been removed from service which award has been impugned and challenged by the petitioner before this Court by this petition under Articles 226 and 227 of the Constitution of India.

The petition was admitted by this Court by issuing rule thereon and ad interim relief against the operation of the impugned award was granted subject to the compliance of section 17B of the ID Act.

I have heard the learned advocates appearing for the respective parties.

As regards the termination of services of the permanent employee, according to the leave regulation or the standing order or under the service rules providing automatic termination, the apex court has held in case of *Uptron India Ltd. versus Shami Bhan* reported in 1998 (1) GLH 60, that the termination of service under service rules or standing orders providing for automatic termination without giving opportunity of hearing is invalid. In the said decision, the apex court has considered the earlier decisions reported in 1985 (3) SCC 116, 1986 (3) SCC 116; 1986 (3) S 156; JT 1986 pg.586, JT 1990(3) SC 725. In another decision of the apex court reported in JT 1993 (3) SC 617, it has been held that where the rule provide for termination of service of an employee who over stays the leave is violative of Article

14, 16 and 21 of the Constitution of India. It was also held that if any action was taken on the basis of such rule without giving opportunity of hearing to the employee, it would be wholly unjustified on the part of the employer. In another decision in case of Bharat Cooking Coal Ltd. and others versus Babulal and others reported in 1997 (2) LLJ 926, it was held that to terminate the contract of employment of three months' notice or pay in lieu of notice is violative of Article 14 of the Constitution. It was also held in the said decision that it was necessary to hold inquiry to give opportunity to the workman before taking any disciplinary action for the alleged dereliction of duty. It has been also held in case of Vasim Beg versus State of Uttar Pradesh reported in AIR 1998 SC Weekly 1159, it was held that in case of discharge of confirmed employee, natural justice would require that the authority should give opportunity to the employee for explaining himself and, therefore, principles of natural justice should be complied with. It is held in the said decision that the law must therefore be now taken to be well settled that the procedure prescribed for depriving a person of livelihood, must met the challenge of Article 14 and such law would be liable to be tested and the orders affecting civil rights or resulting in severe consequences would have to answer the requirement of Article 14. SO, it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between quasi judicial function and the administrative function for the purpose of principles of natural justice. The aim of both, the administration in inquiry as well as judicial inquiry is to arrive at a just and fir decision. It is difficult to say that it should be applicable only to quasi judicial inquiry and not to administrative inquiry. It must logically apply to both.

Therefore, in view of the aforesaid settled legal position of law laid down by the apex court and after considering the detailed reasoning given by the tribunal, I am of the opinion that the tribunal has not committed any error much less an error apparent on the face of the record. The tribunal has discussed each and every aspect in detail in paragraph 13 of the impugned award and has also taken into consideration the undisputed position and also appreciated the evidence on record and has come to a correct, legal and valid decision which does not call for any interference of this court in exercise of the powers under Article 226 and/or 227 of the Constitution of India. As held by the apex court in the decision reported in 1998 (1) GLR 17, this Court cannot exercise the powers like appellate court and, therefore, I am of

the opinion that the impugned award passed by the tribunal is legal, valid and correct award, in consonance with the law laid down by the apex court in various decisions. The petition is, therefore, required to be dismissed.

It was pointed out by Mr. Mehta, the learned advocate appearing for the petitioner Commission that that the respondent workman is a qualified technical person and at present, he is aged about 56 years and considering another aspect that the respondent workman's services were terminated with effect from 9.3.84 and now about sixteen years have passed and in such a situation, submission was made by Mr. Mehta that taking into consideration the intervening period of about sixteen years, the petitioner corporation cannot be held responsible for such delay accrued in disposal of this litigation and, therefore, in such situation, the Commission should not be directed to pay back wages to the workman. He has cited two decisions before this Court, in case of Surjit Ghosh versus Chairman and Managing Director United Commercial Bank and others reported in AIR 1995 SC 1053 and in case of N.A. Vasava versus Chief Refinery Coordinator, Indian Oil Corporation Ltd. and another reported in 1997 (2) GLH 379. In case of Surjit Ghosh (supra), the question has been examined by the apex court and it was held that the appellant should be paid a compensation of Rs.50,000/- in lieu of his claim for arrears of salary and that he should be reinstated in service with continuity of service and continuity of service and without loss of seniority in the past to which he would be entitled today on the basis of his continuous service. In case of NA Vasava (supra), the Division Bench of this Court has considered the said decision in case of Surjit Ghosh and this Court has quoted the observations made by the apex court in Surjit Ghosh's decision which are as under :

"...The bank is a nationalized bank and the money belongs to the public. A huge amount on this scale cannot be paid to anyone for doing no work during this long period just because the bank feels that it has lost confidence in the employee."

In case of NA Vasava, the Division Bench of this Court has, after considering the decision in case of NA Vasava, has directed the respondent IOC to reinstate the appellant in service within some time framed with all benefits of reinstatement except the actual arrears of

salary for the period running between 21.7.92 and 21.7.97. The appellant in the said decision was also held to be entitled to get all other benefits including periodical increments, bonus and continuity of service on account of his reinstatement.

After citing the aforesaid two decisions, one of the apex court and the another of this Court, Mr. Mehta has suggested that some fixed amount may be determined by this Court while passing the final order by quantifying the amount of back wages to met the ends of justice. He has left it to the discretion of this Court. Mr. Supehia, the learned advocate appearing for the respondent workman has also agreed with this suggestion made by Mr. Mehta.

I have considered the submissions made by Mr. Mehta and Mr. Supehia. I have also taken into consideration the decisions cited by Mr. Mehta at the Bar. In the facts and circumstances of the case, I am of the opinion that once the award passed by the labour court is confirmed and when the petitioner Commission has not been able to point out any infirmity in the impugned award passed by the labour court, reinstatement is the normal relief to which the respondent is entitled to. Therefore, reinstatement in service cannot be denied to the respondent workman. Therefore, the question that has remained to be considered is the question of back wages for the intervening period. The services of the respondent workman were terminated with effect from 9.5.84 and he tribunal delivered the impugned award on 4th July, 1988 and, therefore, the respondent is entitled to full back wages for the said period. While admitting this petition, this Court granted ad interim stay of the impugned award subject to the compliance of the provisions of section 17B of the ID Act. Therefore, during the pendency of the said petition from 21st April, 1989 it was the duty of the Commission to comply with the provisions of sec.17B of the ID Act to pay the last drawn wages to the respondent workman from the date of the award till the disposal of the matter. In this regard, the apex court has considered the very same aspect in the decision in case of HMT Ltd. versus Labour Court, Ernakulam and others reported in 1994 (2) CLR 22. In very same identical situation, the apex court held that no party should be made to suffer on account of delay in the decision by the court and taking into consideration the facts of the case, instead of full back wages, the apex court awarded sixty percent of the back wages and accordingly modified the award passed by the labour court to that extent in so far as the back wages

were concerned. Now, it is the submission of Mr. Mehta that this Court should quantify some lumpsum amount towards back wages. I am afraid. I cannot accept the said submission of Mr. Mehta because without considering the pay packet of the respondent workman and without there being any information about the periodical revision in pay of the workman, this Court cannot quantify such lumpsum amount in lieu of back wages. It is, thus, difficult for this court to quantify and fix lumpsum amount in lieu of back wages in absence of the material as aforesaid. I am, therefore, not accepting the said submission of Mr. Mehta for fixing some lumpsum amount in lieu of back wages while ordering reinstatement of the respondent in service. However, in view of the decision of the apex court in case of HMT Ltd. versus Labour Court Ernakulam (supra), I am of the opinion that for passage of sixteen years, the petitioner Commission alone should not be made to suffer. I am of the opinion that it is not a case of loss of confidence. In this case, there was some alleged unauthorized absence. In such cases where there was unauthorized absence for some days or number of days, the apex court has taken a view that drastic penalty of termination cannot be warranted (AIR 1994 SC 215 and 1999 SCC Lab. & Service 666). Therefore, prima facie, the order of termination is illegal arbitrary and hit by Article 14 of the Constitution. It was not a case of serious misconduct committed by the workman. Therefore, considering the matter from that angle also and on the facts and in the circumstances of the case, I am of the opinion that it would be just and proper and also in the interest of justice to award sixty percent of the back wages to the respondent workman for the intervening period with continuity of service and other consequential benefit to which the respondent workman is entitled from the date of termination till the date of reinstatement. While considering sixty percent of the back wages, the petitioner Commission should take into consideration wages and salary and revisions therein from time to time and on that basis, total amount shall be calculated from the date of termination till the date of reinstatement of the respondent and sixty percent thereof shall be paid to the respondent workman. It is clarified that after calculating the back wages as aforesaid, it shall be open for the petitioner Commission to deduct/adjust the amount paid to the respondent workman in compliance of the interim direction of this Court for compliance of the provisions of section 17B of the ID Act. The impugned award of the tribunal is required to be modified to the extent as aforesaid and the rest is required to be confirmed.

Accordingly, I pass the following final order:

Petiion is partly allowed. The impugned award of the tribunal is modified in so far as it relates to the aspect of back wages. The petitioner Corporation is directed to reinstate the respondent workman in service with continuity of service and 60 percent of the back wages from the date of termination till the date of his actual reinstatement in service with all consequential benefits as if the services of respondent workman were never terminated. The Petitioner Commission shall reinstate the respondent workman in service and shall also make payment of sixty percent of the back wages to the respondent workman after adjusting the amounts paid under Sec. 17B of ID Act, 1947 within three months from the date of receipt of the certified copy of this order. Rest of the award of the tribunal is confirmed. Rule is made absolute to the aforesaid extent with no order as to costs.

15.10.1999. (H.K.Rathod,J.)

Vyas